Dr Mohd Yusof bin Ismail v Hj Ismail bin Mohd Nor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)-235 OF 2008

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LOW HOP BING, RAMLY ALI AND T SELVENTHIRANATHAN JJCA

29 OCTOBER 2010

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Tort — Defamation — Damages — General damages — Respondent's counterclaim quantified general damages to be RM1m — Whether general damages sought in defamation action should be quantified or left at large — Whether court should review its decision in Skrine and Co v MBf Capital Bhd & Anor

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The action between Mohd Yusof bin Ismail ('the appellant') and Ismail bin Mohd Nor ('the respondent') was founded on defamation. In his counterclaim the respondent had quantified damages in the sum of RM1m. However, in their submissions both parties concurred that in a defamation action general damages should not be quantified but should instead be left at large. This present appeal raised a common question of law to be determined by this court. This common question was whether the general damages sought in a defamation action should be quantified or left at large. Both parties claimed that the trial judge had not addressed this particular issue and submitted that this court should determine this issue and review this court's decision in *Skrine and Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649 ('*Skrine and Co*'), which had considered this issue.

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Held, allowing the appeal by ordering an amendment to the counterclaim with no order as to costs:

(1) The *Skrine and Co* case held that the matter of quantifying general damages was to be left to the parties. Thus, general damages could either be quantified, in which case, a ceiling was fixed for the compensation to be awarded, or parties could keep general damages at large so that the court could subsequently embark on an exercise to assess damages. In the instant appeal both parties had agreed in their respective submissions that general damages should not be pleaded, which they were at liberty to do. As such, it was ordered that the quantification of RM1m on for general damages in the respondent's counterclaim be deleted (see paras 9–13).

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(2) In the circumstances, the question of reviewing the judgment of this court in the *Skrine and Co* case did not arise at all (see para 12).

[Bahasa Malaysia summary

Tindakan di antara Mohd Yusof bin Ismail ('perayu') dan Hj Ismail bin Mohd Nor ('responden') adalah berdasarkan fitnah. Dalam tuntutan balasnya responden telah menyatakan kuantiti ganti rugi dalam jumlah RM1 juta. Walau bagaimanapun, dalam hujahan mereka, kedua-dua pihak bersetuju bahawa dalam tindakan fitnah ganti rugi am tidak patut dinyatakan kuantitinya sebaliknya tidak ditetapkan. Rayuan ini membangkitkan soalan umum undang-undang untuk ditentukan oleh mahkamah ini. Soalan umum ini adalah sama ada ganti rugi am yang dipohon dalam tindakan fitnah patut dinyatakan kuantitinya atau tidak ditetapkan. Kedua-dua pihak mendakwa bahawa hakim bicara tidak membincangkan isu tertentu ini dan berhujah bahawa mahkamah ini patut menentukan isu ini dan menyemak keputusan mahkamah ini dalam kes *Skrine and Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649 ('*Skrine and Co*'), yang telah mempertimbangkan isu ini.

Diputuskan, membenarkan rayuan dengan mengarahkan pindaan kepada tuntutan balas tanpa perintah untuk kos:

(1) Kes *Skrine and Co* memutuskan bahawa perkara berkaitan penyataan kuantiti ganti rugi am dibiarkan kepada pihak-pihak. Oleh itu, ganti rugi am sama ada boleh dinyatakan kuantiti, kes di mana, had maksimum ditetapkan untuk pampasan diawardkan, atau pihak-pihak boleh biarkan ganti rugi am tidak ditetapkan oleh itu mahkamah boleh kemudiannya memulakan pelaksanaan untuk menaksir ganti rugi. Dalam rayuan ini pihak-pihak telah bersetuju dalam hujahan masing-masing bahawa ganti rugi am tidak patut diplid, yang mana mereka adalah bebas berbuat demikian. Oleh itu, ia adalah diperintahkan bahawa kuantifikasi sejumlah RM1 juta untuk ganti rugi am dalam tuntutan balas responden dipadamkan (lihat perenggan 9–13).

(2) Dalam keadaan ini, soalan untuk menyemak penghakiman mahkamah ini dalam kes *Skrine and Co* tidak berbangkit langsung (lihat perenggan 12).]

Notes

For cases on damages, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 287–300.

Cases referred to

British Transport Commission v Gourley [1956] AC 185, HL (refd)
Liew Yew Thiam & Ors v Cheah Cheng Hoc & Ors [2001] 2 CLJ 385, CA (refd)
Raja Zam Zam v Vaithiyanathan [1965] 2 MLJ 252 (refd)
Skrine & Co v MBf Capital Bhd & Anor [1998] 3 MLJ 649, CA (refd)
Tham Kwa Chin v Choong Hoong Sum [1954] MLJ 161 (refd)

Appeal from: Criminal Suit No S3–23–16 of 2007 (High Court, Kuala Lumpur)

Nantha Balan (Zul Rafique & Partners) for the appellant.
Jefri bin Jaafar (Hadmin Zahar & Rohaine Sharifudin) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL: QUESTION FOR DETERMINATION

[1] On 19 April 2010, learned counsel for both the appellant and the respondent raised a common question of law for our determination in the instant appeal. The question concerns the quantification of general damages in the pleading for an action founded on defamation.

THE DEFENDANT'S COUNTERCLAIM

[2] In para 47(b) of the counterclaim, the defendant had quantified damages in the sum of RM1m.

GENERAL DAMAGES IN DEFAMATION ACTION

[3] In their respective submissions, Mr Nantha Balan, learned counsel for the plaintiff, and Mr Jefri bin Jaafar for the defendant concurred that general damages in a defamation action should not be quantified and should instead be left at large. Both of them implored the court to review *Skrine & Co v MBf Capital Bhd & Anor & Other Appeals* [1998] 3 MLJ 649 (CA). They referred to:

(a) *Carter-Ruck on Libel and Slander, (4th Ed) Butterworths London 1992* at pp166–171;

(b) *Atkin's Court Forms,* (2nd Ed) Vol 32 London para 33;

(c) *Skrine & Co*;

(d) *Liew Yew Thiam & Ors v Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385;

(e) *Tham Kwa Chin v Choong Hoong Sum* [1954] 20 MLJ 161;

(f) *Raja Zam Zam v Vaithiyanathan* [1965] 2 MLJ 252; and

(g) *British Transport Commission v Gouriey* [1956] AC 185.

[4] The learned trial judge's grounds of judgment apparently did not address this particular issue.

[5] In view of the concurrent submissions, on 19 April 2010, we held that general damages sought in para 47(b) of the defendant's counterclaim founded on defamation should not be quantified but should instead be left at large. We therefore ordered that the quantification of general damages (in that defendant's counterclaim in the sum of RM1m) be deleted. Both learned counsel had requested for our grounds of judgment. We now give our grounds.

[6] The proposition that general damages sought in a defamation action should be left at large may be found in *Carter-Ruck on Libel and Slander*, in the following passage:

> An action for defamation is essentially an action to compensate a person for the harm done to his reputation. In all actions for libel and in some actions for slander the law presumes that the plaintiff has suffered harm and in these actions, usually described as being actionable per se, the actual sum to be awarded - the damages - are said to be 'at large'.

[7] *Atkin's Court Form*, para 33 categorically states as follows:

> General damages. Particulars of general damages, i.e. unliquidated or unascertained damages, are not required specifically to be pleaded.

[8] In *Tham Kwa Chin*, the plaintiff quantified general damages in the sum of $15,000 in the statement of claim. Spenser Wilkinson J said:

> I would point out that it is neither necessary nor in accordance with the best traditions of pleadings to claim any specified sum in a statement of claim when claiming general damages. Particulars with figures for special damages have, of course, to be given but for general damages the proper prayer is 'The plaintiff claims damages'.

[9] Where general damages was quantified, eg as in *Raja Zam Zam*, Raja Azlan Shah J (now HRH The Sultan of Perak) observed that that was a peculiar way of claiming general damages. It is not the present practice to specify the amount of general damages in the pleadings. The learned judge applied the dicta of Lord Goddard in *British Transport Commission v Gourley* [1956] AC 185:

> In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage which has to be specifically pleaded and proved. Secondly, there is general damages which the law implies and which is not specifically pleaded.

[10] The issue of quantifying general damages, with particular reference to a claim founded on a defamation action, came up for consideration by this court in *Skrine & Co*. Gopal Sri Ram JCA (later FCJ) stated:

> We are, therefore, unable to agree with Raja Aziz's submission that there was once a practice of quantifying general damages but that has since fallen into disuse and it would be wrong to reinstate it. In our judgment, there is no rule of practice going either way. A plaintiff in a defamation action may quantify his damages, in which event he runs the risk of not receiving anything more than the amount stipulated in his writ. However, he is equally at liberty not to specify a sum in which event arguments may be addressed in the usual way at the conclusion of the trial upon that issue.

[11] In our respectful view, the above passage has left the quantification of general damages very much to the parties. General damages may be quantified, in which case, a ceiling is fixed for the compensation to be awarded. Parties may also keep general damages at large so that the court may subsequently embark on an exercise to assess damages.

[12] In the instant appeal, both the plaintiff and the defendant have agreed in their respective submissions that general damages should not have been pleaded. They are of course at liberty to do so. This has been clearly explained by this court in *Skrine & Co*. In the circumstances, the question of reviewing the judgment of this court in *Skrine & Co*, does not arise at all.

CONCLUSION

[12] In view of the concurrent submissions, we ordered that the quantification of RM1m for general damages in para 47(b) of the defendant's counterclaim be deleted. I should now read 'general damages' simpliciter. The appeal is allowed to that extent. Deposit was ordered to be refunded to the plaintiff. No order as to costs.

Appeal allowed by ordering an amendment to the counterclaim with no order as to costs.

Reported by Kohila Nesan